THE REPORTER

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JUSTICE MURPHY DIES—A Loss to COs

The passing of Supreme Court Justice Frank Murphy is of special significance to conscientious objectors. He was never known to participate in a decision adverse to objectors and he usually wrote dissenting opinion in cases they lost.

He left a record of adherence to the cause of religious liberty which is without equal in his time on the bench, and probably in any time.

His record began in the case of *Falbo* v. *U. S.* in January of 1944. There in a dissenting opinion he made the statement that he has repeated since:

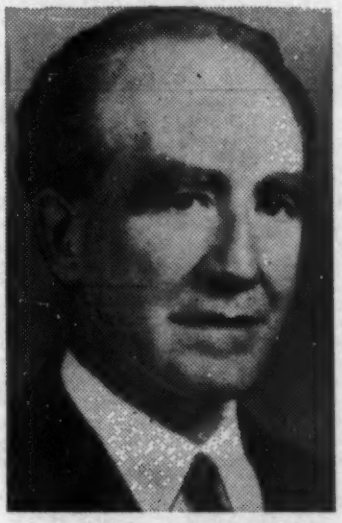
"The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."

In October of 1945 Murphy was with the majority in the case of *Estep* v. *U. S.*, and he said: "We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and a sense of proportionate values. In this instance it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. As long as courts are open and functioning, judicial review is not expendable."

Opinions Favor JWs

His last opinion in an objector case was delivered in November of 1947. That was the case of *Cox* v. *U. S.* In his dissent Justice Murphy said: "It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers, and the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid."

(*Continued on page four*)



JUSTICE MURPHY

Kosch Gets Appointment

Colonel Lewis F. Kosch has been appointed Deputy Director of the Selective Service System by the Director, Major General Lewis B. Hershey.

During World War II Kosch was Chief of Camp Operations Division of Selective Service which had charge of conscientious objectors assigned to Civilian Public Service.

After his separation from Selective Service Kosch moved to California where he engaged in raising chickens. He was recalled to National Headquarters in Washington as an assistant director following the enactment of the 1948 selective draft law.

Kosch began his career as a country school teacher in Putnam County (Ohio) schools and later taught in the Warren, Indiana, High School and was superintendent of the Grand Rapids, Ohio, High School.

His Army career began in 1910 when he joined the National Guard. He saw active duty on the Mexican border in 1916 and after serving in France during World War I became a first lieutenant in the Regular Army Field Artillery.

Colonel Kosch's duties, as defined in an official order issued by General Hershey, are: (1) assume the duties of the Director in his absence; (2) represent the Director in activities with other agencies, as designated by him; (3) obligate funds; and (4) perform such other functions as the Director may delegate.

JUDGE OK's NSB AS FRIEND OF COURT

During the past winter the National Service Board was given permission by Judge Chavez of the United States District Court for Puerto Rico to enter the *Pope* case as Friend of the Court.

Robert Parks Pope and Lillian Pope were two of the people in Puerto Rico who were indicted last fall for counseling non-registration possibly because they carried posters outside of a registration place.

One of the defendants was Frances Walker. Stan Weaver of Clinton, Michigan, a friend of this defendant, visited our office in February following his return from Puerto Rico, to say that the attorneys in Puerto Rico wanted someone in Washington to do research for them. Although the trial was then only a couple of week away, much technical assistance was still needed, and all of the publicity which the case had produced had yielded no technical assistance.

NSB agreed to send the lawyers any material it could find. After the material was prepared however, it occurred to us that we might be entered in the case as Friend of the Court. A Friend of the Court or amicus curiae is some party, neither plaintiff nor defendant, who is permitted to appear to enlighten the court on the issues of the case for the benefit of the court.

Since then the case has been indefinitely continued at the request of the prosecution on at least two occasions and may never come to trial. The material prepared has been sent to three other attorneys who have been handling cases and is being used in at least one pending case.

REPORTER readers will perhaps wonder why this type of thing is not printed in our column more regularly. Publicity is of doubtful value to the defendants in many of these cases and our first duty is to them. From time to time, where the published material could not affect the outcome of the trial, and where announcements can be made concerning the cases without exploiting them for a "cause" which it is doubtful that the defendant adheres to, and which NSB certainly doesn't adhere to, since we are only concerned with helping any and all CO defendants obtain what rights they may have under the law regardless of the particular variety of the peace principle they may advocate, NSB will make brief announcements of these things.

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STAY OF INDUCTIONS DECEPTIVE

The process of classification since the suspension of inductions has kept pace with the previous rate of classification, at least as far as COs are concerned.

Inductions were stopped at the end of January. At that time there were 4,903 registrants classified IV-E. Since then the total of IV-E's has risen during February, April, and June to 5,793, 6,439 and 7,711 respectively.

No lull has occurred in Selective Service classification procedure and NSB is busy answering inquiries about COs all the time.

Some persons are perhaps making the mistake of thinking that they don't need to straighten out their classification because of the stay of inductions. They may find it more difficult to do later if they ignore the proper classification procedure now.

WHEN MINISTER MEETS REBEL

Larry Gara, Dean of Men at Bluffton College (Ohio) during the past year, was sentenced to an 18-month prison term by Judge Kloeb in Federal District Court in Toledo on May 6. Denied bail he has been moved to the federal prison at Milan, Michigan, while his appeal is taken up.

Gara was a non-registrant of World War II who met Charles Richert, a recent non-registrant, after Richert had refused to register under the draft law. He told Richert to follow his conscience and not to be intimidated.

Gara was convicted for knowingly counseling, aiding, and abetting another to refuse registration.

Ministers and others have been wondering what the decision in the *Gara* case means for them.

A verdict of guilty was possible even though Gara and Richert met after Richert's offense had started, since the court said any refusal to register is a continuing offense, and therefore Richert was committing the offense after Gara had met him as well as before. Any words, even though they do not expressly solicit non-registration or point out that it would be in the interest of the listener to refuse to register, if they would probably produce that effect, and it is actually known that they probably would produce that effect, are indictable, as the decisions now stand.

The father of a Jehovah's witness was similarly indicted in 1943.

The prosecution during the course of the case remarked that if the finger of shame had been pointed at Richert he might have altered his attitude. Because of this remark, some of the followers of the case have come to believe that it stands for the principle that a man might be indicted for just maintaining silence in the present of a non-registrant. This remark however was just a passing remark of the prosecutor, whether objected to or not we do not know. It apparently was not part of the decision. Ordinarily a private citizen is not under a duty to point the finger of shame at any criminal. Having assumed to give advice, however, he must give the right advice.

What is Counseling, Aiding, or Abetting?

Between the actual Gara case and the case of some one who says nothing are countless intermediate situations. There is the grocer who sells Richert food, the landlady who rents him a room, and the minister who says, "We think the law under which you are indicted is unjust. We want you to get a good attorney and we will do what we can to help you obtain probation." People all over the country want to know what test to apply to these cases in order to know which are legal and which are not.

Perhaps some feel that the case ought to be advertised as applying to every kind of contact with a non-registrant, thinking that this might strengthen opposition to civil authority. The great majority who do not encourage civil disobedience will not react that way, and the case is anything but a lodestone in the literature of a growing movement so far as the great majority of pacifists are concerned. Even the Mennonites, who have historically followed such extreme forms of non-cooperation as mass emigration from countries which enacted service laws, have not been inclined to accept illegal forms of non-cooperation.

A more likely effect of the case is that it is going to cause many people to abstain from normal contact with men like Richert out of fear. They will fear to discuss the weather or to offer a glass of water. It is even conceivable that some ministers may be afraid to mention conscience to their congregations in a sermon. This effect is deplorable, and it stems from a tendency to overdraw the significance of the case. We cannot believe that an American court could have intended such results.

Known Tendency of Words is Test

In order to distinguish legal from illegal conduct our readers can only apply the test applied by the court. Would the natural and probable effect of the words be to encourage refusal to register? Whether this is the case will depend upon the understanding between the speaker and the listener as to what they meant; for instance if the speaker is himself a non-registrant, the probable meaning to be attached to the words will be different than if he believed in registration; if the speaker makes his statement before the refusal to register is a known fact, it might require stronger words than where the offense of refusal had already begun. The natural and probable effect of words is going to depend on circumstances—who is speaking, who is being addressed, when the words are said, as well as what the words are. Therefore it is not possible to take any set of words and say, "These will always be illegal", or, "These will always be legal." The reader must decide that for himself. It is the total effect of one's entire approach rather than this or that word of the English language which is in question.

However, it is never a good practice to try to draw the line between the criminal and the non-criminal as closely as possible and then see how close you can come to it.

Readers should not feel that N.S.B. approves of the law as announced in the *Gara* case and previous cases, in setting it out here as a guide for conduct. Our commentary on the *Bisso* case in this issue shows what we think of the "continuing offense" doctrine as law. But so long as the case stands as law, NSB is under a duty to inform its readers of the meaning of the case as best it can, so that the reader will at least know what it means for him.

Lutherans Assert Stand

Lutheran objectors will find official recognition of and support for their position in the pronouncement adopted by the Executive Board of the United Lutheran Church in America on April 22, 1949 and the Board of Social Missions on April 28.

Admitting that "Christians differ as to their right to participate in existing war" the statement calls upon the Church to "extend Christian fellowship, love and ministration to all those who accept miltary service as their duty and **to those who hold it their duty to refuse any participation in war.**"

What Would You Do?

A young Mennonite gets I-A and appeals. The local board asks him to come in for a hearing. At the hearing he is called disloyal and humiliated. The board flatly says that no IV-Es will be given but changes his classification to II-C. The objector still doesn't feel satisfied but since there are no inductions and to keep peace with the board he drops the matter. What would you do?

ANSWER TO PROBLEM ON PAGE 4

Bisso's Adventures in Objector Land

By WILLIAM E. ROSTRON, JR., A.B., LL.B. (Harvard School of Law)

Judge Louis E. Goodman in the recent case of *U. S. v. Wm. F. Bisso*, criminal case No. 31874—G, U. S. District Court for the Northern District of California, April 4 and 5, 1949, has cleared away some current false impressions concerning the law on conscientious objector cases.

Bill Bisso, a Catholic dairy worker from Sonoma, Calif., was not familiar with the conscientious objector deferment. He had told his exemption board that he would rather go to jail than go to the army.

After a futile attempt to take an appeal when his ten days had passed, he was given a I-A and ordered to report for induction. He went to the induction center but refused to sign the induction papers or to take the step forward which constitutes induction under the present army ceremony. He even refused to enter the room where the ceremony was being held.

Bill learned about the Special Form for Conscientious Objectors at this stage, and filed it after he had already avoided induction into the army.

After he filed it the board took no action on it whatsoever, refusing to decide the claim therein presented.

Bisso's filing of the Form after he had been interviewed by the United States Attorney for avoiding induction reminds one of the trial in *Alice's Adventures in Wonderland*, where Alice started to grow larger just before she was called to the witness stand.

"'You've no right to grow here,' said the Dormouse."

When his case came to trial it was argued that the Government did not have sufficient evidence to obtain a conviction because they could not show that the exemption board had acted on the claim, even though it was filed after the date when Bisso avoided induction. There is good argument for this point of view. The jurisdiction of Selective Service to act on cases is not terminated when the Department of Justice begins to prosecute. For instance, Bill was reclassified because of his prison sentence, a month after his trial was over. The board has undoubted jurisdiction to act, and therefore Bill was entitled to an appeal under Section 6 (j) of the Selective Service Act of 1948, which reads "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board." Bill's claim was "not sustained" when the board refused to make a decision on it, either upholding it or rejecting it; and therefore under the clear reading of the Act, Bill was entitled to an appeal so long as the local board did not lose jurisdiction.

The question might arise as to whether, even if the board did sustain his claim and grant a IV-E, that would in any way have affected the fact that he had already refused to be inducted. Quite probably it would have. The Selective Service Act, Section 6 (j), reads: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." The words "Nothing contained in this title" negative the applicability of everything else in the Act to conscientious objectors after their claim is sustained. They negative 4 (a), which gives the President power to induct men, and Section 12 (a), providing for punishment of the people who violate the Act. Therefore it would not have been futile from Bill's point of view for the exemption board to examine his claim and to give him a IV-E. The board had jurisdiction; the Act granted Bill a right to appeal; and that appeal if successful could have affected the question of whether he was punishable under the law.

"'It's always tea-time, and we've no time to wash the things between whiles.'"

Judge Goodman seemed to assume the possibility that these things were true, although the argument presented by Clarence Rust, Bill's attorney, may have been based on Selective Service regulations rather than the quotations here cited. In fact before the case came to trial, the Judge had continued it for several weeks in order to give the exemption board a last chance to act on it.

It is interesting to note that the United States Attorney in order to make any case at all had to abandon the continuing offense theory. It has frequently been said that a man who refuses to perform a duty under the Selective Service Act continues his offense every day until he actually performs the duty. This argument has been used to send men to prison for a second time, to deny them probation because they would be violating the law while they are on probation, and to try their cases wherever the men were arrested on the theory that they were violating the law wherever they went and that therefore the offense was committed in any place where they might go. The continuing offense theory has been one of the stock theories for punishing objectors.

If this theory were correct then it should be impossible for the board to say that Bill Bisso had filed his Form too late, even without the argument on the Bisso case we have given, because while the filing might have been too late as to that part of his offense that had already occurred, it would not have been too late certainly with regard to that continuing portion of the offense which might occur after the filing. Therefore when the exemption board and the United State Attorney argued that the filing was too late, they were really working on the theory that the offense was complete on the first day that Bisso committed it. This abandonment of the continuing offense theory by Selective Service and a United States Attorney was a starting feature of the case.

The United States Attorney was probably correct that a completed offense theory was more satisfactory from his point of view here; and we think he was probably right on that point under the law; but it wouldn't have helped him much in this case, because regardless of any continuing offense or completed offense doctrine, the specific wording of the Selective Service Act would be in Bill Bisso's favor. The words "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," would protect him even if the offense had been completed before he filed his Form.

"'Sentence first—verdict afterwards.'"

Judge Goodman, however, based his decision on another ground which makes the case ever more unique than the United States Attorney's abandonment of the continuing offense theory. Judge Goodman said that Bisso was insincere. The unusual thing about this is that whenever the courts have dealt with Selective Service cases they have insisted that ordinarily they have no power to decide the claims of the registrant. The Selective Service Act in Section 10 (b) (3) says that board decisions shall be final. This has been construed to mean that an objector cannot appeal his classification to court, nor can a court upset it except under unusual circumstances.

THE REPORTER for February of 1949, pointed out that the cases dealing with this had been cases of Jehovah's witnesses seeking a ministerial deferment, and that this theory of the finality of the board decisions should not apply in cases of men seeking IV-Es because Section 6 (j) of the Selective Service Act sets up, to handle objector claims, a special board procedure which is not used for any other exemption or deferment; and that special procedure makes no mention of the finality of board decisions in objector cases. Therefore there is

(*Continued on page four*)

MURPHY *(from page one)*

All of these cases in which Justice Murphy took the side of the objector were cases of Jehovah's witnesses seeking a ministerial deferment. They might not have a great legal significance for people seeking IV-E; but to the cause of conscientious objection in its non-legal aspect, they are a great contribution.

In each one of these cases Hayden C. Covington, the attorney for Jehovah's witnesses, represented the defendant. It was in these cases that Hayden Covington established his reputation as the legal representative of the witnesses. There could be no more unusual sympathy between men of different Faiths than the sympathy shown by Justice Murphy in his opinions for the great efforts of the Jehovah's witnesses' representative.

The National Service Board joins with all of the other minorities who have prospered because of his presence on the Supreme Court in mourning for Justice Murphy.

Bisso *(from page three)*

reason to think that objector cases should differ, that the objector should be permitted to appeal his claim to court, and that the court should not be restricted in its power to upset board decisions, but should be just as free as the boards themselves in making a classification.

Judge Goodman's decision was unique in that he passed on the sincerity of Bisso's claim although the board had never passed on it and therefore he was doing more than reviewing a board decision. He was deciding the claim himself. Therefore the Bisso case seems to stand for the proposition that the court can act on objector claims, and that board action need not be final.

It cannot be considered injurious to COs generally that Judge Goodman should have discarded the finality doctrine in this type of case.

"'Who cares for you?' said Alice . . . 'You're nothing but a pack of cards!'"

Judge Goodman's decision would seem to indicate that he accepted as a fact the right of the objector to file his claim after he had refused to be inducted, because in Selective Service cases, where the court is reviewing the action of an administrative agency, namely the Selective Service System, the court usually will not examine questions of fact, such as sincerity, unless the exemption board procedure has been incorrect. It seems that Judge Goodman would never have gotten as far as the question of whether Bill's claim was good unless he first had tacitly decided that the board was wrong in refusing to examine the claim. In all cases the judge has not bothered to examine the factual claim unless he has first decided that the exemption board was wrong in not doing it.

Therefore the Bisso case has done to popular notions on conscientious objector law what Sampson did to the house of the Philistines. Selective Service and the United States Attorney abandoned the continuing offense theory and argued a completed offense theory. The Judge refused to apply the doctrine of the finality of board action and proceeded to act on the case himself.

The *Bisso* trial reminds one of the trial of the Knave of Hearts in *Alice's Adventures in Wonderland.*

"The King and Queen of Hearts were seated on their throne when they arrived, with a great crowd assembled about them—all sorts of little birds and beasts, as well as the whole pack of cards . . .

"At this moment the King, who had been for some time busily writing in his notebook, called out, 'Silence!' and read out from his book, 'Rule Forty-Two. *All persons more than a mile high to leave the court.*'

"Everybody looked at Alice.

"'I'm not a mile high,' said Alice.

"'You are,' said the King.

"'Nearly two miles high,' added the Queen.

"'Well, I shan't go, at any rate,' said Alice: 'besides, that's not a regular rule. You invented it just now.'

"'It's the oldest rule in the book,' said the King.

"'Then it ought to be Number One,' said Alice . . .

"At this the whole pack rose up into the air, and came flying down upon her; she gave a little scream, half of fright and half of anger, and tried to beat them off . . ." (Lewis Carroll, *Alice's Adventures in Wonderland.*)

The legal doctrines flew up and vanished in the Bisso case the way the cards did for Alice, and even an attorney might have some difficulty predicting what will be accepted in the future.

"... sentence three of the players ... for having missed their turns."

Bisso was going to appeal his case; but no bail was allowed; and so the appeal was dropped because Bill thought he would have served his whole sentence by the time the case was straightened out anyway. Had the appeal been perfected it might have been questioned whether there was any real evidence at all against Bisso on which a finding of insincerity could be made, not to mention proving him guilty beyond a reasonable doubt.

It may be that there are simpler grounds than these for rationalizing the conduct of the court in the Bisso case, but it is not apparent in the transcript that any simpler grounds was in the mind of any of the people who participated. It is a case that might well be referred to wherever the doctrine of continuing offense or of the finality of board action present obstacles to the objector. It shows that the boards themselves quite correctly treat the offense as completed on the first day that it is committed, and that courts will not regard board action as final at all in conscientious objector cases.

What Would You Do?

Answer to Problem on Page Two

By Paul Goering, Editor

Many objectors seem reluctant to approach their boards or use the procedure set up for them because they fear the board will be antagonized. On the other hand some objectors have had to literally instruct their boards about classifying COs. While an objector's desire to be at peace with his neighbors and exemption board members is commendable there is no value in avoiding the board if, for that reason, he fails to do what is necessary to get his classification.

A board member will hardly change his attitude because the registrant stays away except perhaps to think that the objector doesn't regard his classification of much importance.

There is a procedure set up which is intended not only to protect the government from charlatans but to protect objectors from mistreatment.

It should be remembered that Congress has passed a law which gives protection to persons with conscientious objections to war. Under it over 7,000 persons have been classified in IV-E and an unknown number in I-A-O. Congress didn't make these provisions to be nice or courteous. Your IV-E is not a gift from your exemption board. It is a statutory provision which Congress did not intend to have abused by persons administering the law.

No local board can arbitrarily refuse IV-E on the basis of prejudice or dislike for the position. They aren't asked to like it or to agree with the man. They have a duty to carry out the provision of the law and classify as COs those persons who have such beliefs.

For example, one exemption board in Colorado has reportedly given IV-E to two objectors only after they applied to leave the country to do relief work. One of them reported that the clerk said that only those who go abroad will get IV-E. The others are appealing from I-A and II-C classifications. There is no requirement to do relief work to get IV-E and the board can not make such a condition.

One of the assumptions frequently made by an objector who asks for an appeal is that there is nothing further to do when the local board refuses to grant an appeal. But he shouldn't leave it at that. He should seek the best remedy open to him. If he is in doubt about what he should do, he should write the NSB.